

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Reexamination of Roaming) WT Docket No. 05-265
Obligations of Commercial)
Mobile Radio Service Providers and Other)
Providers of Mobile Data Services)

ORDER ON RECONSIDERATION

Adopted: June 25, 2014

Released: June 25, 2014

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration (Order), we address a petition filed by Blanca Telephone Company (Blanca), seeking reconsideration of the Commission's decision to reject a uniform time limit or "shot clock" on all data roaming negotiations¹ in the Commission's *Data Roaming Order*.² We find that Blanca presents no material error or omission in the Commission's *Data Roaming Order* or any additional new facts warranting reconsideration. As explained in the *Data Roaming Order*, the Commission's decision to reject a single time limit for all negotiations but to consider requests for time limits on a case-by-case basis provides appropriate flexibility in negotiations that will involve a wide range of evolving technologies and commercial contexts, while allowing parties to seek Commission intervention if a negotiating partner unduly delays a particular negotiation. We therefore deny Blanca's Petition.³

II. BACKGROUND

2. ***Data Roaming Order.*** "Data roaming" allows consumers to obtain data services over their mobile devices when they travel outside their own provider's network coverage areas, by relying on another provider's network.⁴ In the *Data Roaming Order*, the Commission sought to promote consumer access to nationwide mobile broadband service by adopting a rule requiring facilities-based providers of commercial mobile data services to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations.⁵ To ensure that the data roaming rule is sufficiently flexible to apply to a wide range of evolving technologies and commercial contexts, the Commission allowed providers "[to] negotiate the terms of their roaming arrangements on an

¹ Petition for Reconsideration of Blanca Telephone Company, WT Docket No. 05-265 (filed June 6, 2011) (Petition).

² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 (2011) (*Data Roaming Order*), *aff'd*, *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012); *see also* 47 C.F.R. § 20.12(e).

³ As noted below, we resolve this petition pursuant to our delegated authority under Section 1.429(l) of the Commission's rules. *See* 47 C.F.R. § 1.429(l).

⁴ *Data Roaming Order*, 26 FCC Rcd 5411, para. 1.

⁵ *Data Roaming Order*, 26 FCC Rcd 5411, 5432-33, paras. 1, 42-43; *see also* 47 C.F.R. § 20.12(e).

individualized basis.”⁶ As the Commission explained, this means that providers may tailor roaming agreements to “individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.”⁷

3. The Commission made clear that, once a provider requests a data roaming arrangement, a would-be host provider “has a duty to respond promptly to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request.”⁸ The Commission also addressed commenter proposals designed to limit delay tactics in data roaming negotiations, including proposals to establish a mandatory, uniform time limit, described as a “shot clock,” for all negotiations subject to the Commission’s data roaming rule.⁹ The Commission declined to adopt a mandatory, uniform time limit based on its assessment that some data roaming negotiations may be “more complex or fact-intensive” than others and require more time.¹⁰ Instead, the Commission determined that if a provider believes that another provider is unduly delaying a data roaming negotiation, it may ask the Commission to set a time limit for that particular negotiation.¹¹

4. The Commission provided that it would address all such individual requests for a time limit, and any other disputes over a provider’s conduct during data roaming negotiations, on a case-by-case basis, taking into consideration the totality of the circumstances.¹² Among the factors that the Commission stated it may consider in determining the commercial reasonableness of a host provider’s conduct during negotiations are whether the provider “has responded to the request for negotiation,” whether it has engaged in “a persistent pattern of stonewalling behavior,” and “the length of time since the initial request.”¹³ The Commission held that a party to a data roaming dispute may seek relief through either a petition for declaratory ruling or a formal or informal complaint,¹⁴ and it established specific

⁶ *Data Roaming Order*, 26 FCC Rcd at 5432-33, paras. 43–45.

⁷ *Id.* at 5433, para. 45. The Commission also deemed it reasonable for a provider *not* to offer a data roaming arrangement to a requesting provider that is not “technologically compatible,” or where it is not “technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider’s network necessary to accommodate roaming” for that service “are not “economically reasonable.” *Id.* at 5432–33, para. 43. Likewise, the Commission determined that it is reasonable for a provider to “condition the effectiveness of a data roaming arrangement on the requesting provider’s provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.” *Id.* at 5433, para. 43.

⁸ *Id.* at 5432, para. 42.

⁹ *Id.* at 5451–52, para. 84 (internal citations omitted). Several commenters had urged the Commission to adopt a “shot clock” in order to address alleged practices of stonewalling and delay by the larger national carriers. *See, e.g.*, Reply Comments of Cox Communications, WT Docket No. 05-265, at 6–8 (filed July 12, 2010).

¹⁰ *Data Roaming Order*, 26 FCC Rcd at 5452, para. 84.

¹¹ *Id.*

¹² *Id.* at 5452, paras. 84-85. The Commission also stated that it would address, on a case-by-case basis, disputes about whether a particular data roaming offering includes commercially reasonable terms and conditions. *Id.* at para. 85.

¹³ *Id.* at 5452, para. 86.

¹⁴ *Id.* at 5449, para. 75 (providing that a party to a data roaming dispute may file a petition for declaratory ruling under Section 1.2 of the Commission’s rules or use certain of the complaint processes established in Part I, Subpart E of the Commission’s rules); *see also* 47 C.F.R. § 1.2 (declaratory rulings); 47 C.F.R. § 20.12(e)(2) (incorporating the formal and informal complaint procedures in Sections 1.716 through 1.718, 1.720, 1.721, and 1.723 through 1.735 of the Commission’s rules, 47 C.F.R. §§ 1.716–1.718, 1.720, 1.721, and 1.723–1.735, excluding the remedy of damages). The Commission indicated that whether the appropriate procedural vehicle for a dispute is a petition for declaratory ruling under Rule 1.2 or a complaint under Rule 20.12(e)(2) may vary depending on the circumstances specific to each dispute. *Data Roaming Order*, 26 FCC Rcd at 5449, para. 75.

dispute resolution procedures to ensure the prompt resolution of any data roaming disputes brought before it.¹⁵

5. ***Blanca Telephone Company Petition for Reconsideration.*** On June 6, 2011, Blanca filed the instant Petition, which requests that the Commission “reconsider and reverse its decision declining to adopt a time limit for roaming negotiations” that are subject to the Commission’s data roaming requirements.¹⁶ Blanca explains that the proposed time limit or “shot clock” would allow “either party to a negotiation, after a reasonable period such as 60 days,” to refer the matter to the Commission for resolution pursuant to the dispute resolution processes established in the *Data Roaming Order*.¹⁷ Blanca contends that the Commission’s decision to address claims of undue delay on a case-by-case basis, rather than establishing a uniform time limit for all data roaming negotiations, is flawed in two respects. First, it argues that the Commission’s stated rationale for this decision – *i.e.*, that some negotiations may be more complex or fact-intensive than others and thus require more time – failed to quantify the actual number of negotiations that are likely to involve complex issues.¹⁸ According to Blanca, “[i]f it turns out to be the case that relatively few negotiations fall into the ‘complex’ category,” then the Commission’s determination “will have imposed an unwarranted disadvantage on smaller rural and regional” providers seeking data roaming arrangements with nationwide providers.¹⁹ Second, Blanca maintains that the Commission’s decision to impose time limits on a case-by-case basis will place an additional burden on smaller carriers that lack bargaining power by requiring them to demonstrate the need for a time limit in the course of their negotiations with larger national providers.²⁰

6. On November 21, 2011, the Commission released a *Public Notice* announcing the filing of the Petition and seeking comment.²¹ The *Public Notice* was published in the Federal Register on December 1, 2011.²² In response, the Commission received three comments and three replies.²³ Other than AT&T, all commenters, including several providers and associations, supported the petition.

¹⁵ For example, the Commission delegated authority to the appropriate Bureaus to resolve declaratory ruling petitions and complaints arising out of the data roaming rule. *Data Roaming Order*, 26 FCC Rcd at 5451, para. 82. The Commission also established that Commission staff, in its discretion, may require the parties to submit to the Commission their “best and final offers,” and if a violation of the data roaming rule is found, to rely on the submitted offers in determining an appropriate remedy. *Id.* at 5450, para. 79. Similarly, the Commission stated that Commission staff, upon request in appropriate cases, may order a host provider to provide data roaming on its proffered terms during the pendency of a data roaming dispute, subject to a possible true-up once a roaming agreement is in place. *Id.* at 5450–51, para. 80. Finally, the Commission noted that its Accelerated Docket procedures, including pre-complaint mediation, may be available to data roaming complainants in appropriate cases. *Id.* at 5449–50, para. 77.

¹⁶ Petition at 5, 9 (internal citation omitted).

¹⁷ *Id.* at 8, 9.

¹⁸ *Id.* at 7 (citing *Data Roaming Order*, 26 FCC Rcd at 5452, para. 84).

¹⁹ *Id.* at 7.

²⁰ *Id.* at 8.

²¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Public Notice, Report No. 2938 (2011).

²² 76 Fed. Reg. 74721 (2011).

²³ See Comments of MetroPCS Communications, Inc., NTELOS Holdings Corp., PR Wireless, Inc., Revol Wireless, National Telecommunications Cooperative Association, Rural Cellular Association, Rural Telecommunications Group, United States Cellular Corporation, WT Docket No. 05-265 (filed Dec. 16, 2011) (“MetroPCS *et al.* Comments”); Comments of NTCH, Inc., WT Docket No. 05-265 (filed Dec. 16, 2011) (“NTCH Comments”); Comments of AT&T Inc., WT Docket No. 05-265 (filed Dec. 16, 2011) (“AT&T Comments”); Reply Comments of AT&T, WT Docket No. 05-265 (filed Dec. 27, 2011) (“AT&T Reply Comments”); Reply Comments of Blanca Telephone Company, WT Docket No. 05-265 (filed Dec. 27, 2011) (“Blanca Reply Comments”); Reply Comments (continued . . .)

III. DISCUSSION

7. Pursuant to Section 1.429 of our rules, parties may petition for reconsideration of final orders in a rulemaking proceeding.²⁴ Reconsideration is generally appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.²⁵

8. In 2011, in order "to allow the agency to resolve certain petitions for reconsideration more efficiently and expeditiously," the Commission amended its rules to delegate authority to the relevant bureau or office to dismiss or deny petitions filed in either rulemaking or non-rulemaking proceedings, if the petition "plainly does not warrant consideration by the full Commission."²⁶ Among the kinds of petitions that the Commission found would satisfy this standard are those that fail to identify any material error, omission, or reason warranting reconsideration, or that rely on arguments that have been fully considered and rejected by the Commission within the same proceeding.²⁷ In this case, as discussed below, Blanca's first argument about the likely frequency of complex data roaming negotiations that may require more time than permitted under a "shot clock" is a wholly speculative one that fails to identify any material error, omission, or reason warranting reconsideration. Blanca's second argument, based on the incentives of the largest mobile broadband providers, was specifically considered and rejected in the *Data Roaming Order*, and in any event also fails to identify any material error, omission, or reason warranting reconsideration. Given these circumstances, we are exercising our delegated authority under Section 1.429(l) of the rules to address and deny Blanca's petition.

9. As noted above, Blanca first challenges the rationale for the Commission's decision to reject a "shot clock" in favor of a case-by-case approach for addressing allegations of undue carrier delay of negotiations, which the Commission preferred because some negotiations may be more complex or fact-intensive than others. Blanca argues that the Commission failed to quantify the actual number of negotiations that are likely to involve complex issues.²⁸ It hypothesizes that it may "tur[n] out to be the case" that there are relatively few complex negotiations requiring additional time.²⁹ We find that this kind of speculation about the nature of future data roaming negotiations under the Commission's new rules

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of Blooston Rural Carriers, WT Docket No. 05-265 (filed Dec. 27, 2011) ("Blooston Reply Comments"); *see also* *Ex Parte* Letter of MetroPCS Communications, Inc., National Telecommunications Cooperative Association, NTELOS Holdings Corp., Rural Cellular Association, United States Cellular Corporation, and Telecommunications Law Professionals PLLC, WT Docket No. 05-265 (filed Dec. 16, 2011) ("MetroPCS *et al.* *Ex Parte*"). We note that, since the filing of this record, MetroPCS merged with T-Mobile. *See* Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc., WT Docket No. 12-301, *Memorandum Opinion and Order and Declaratory Ruling*, 28 FCC Rcd 2322 (WTB, IB 2013). For convenience, we will continue to refer to the commenter as MetroPCS for purposes of this Order.

²⁴ 47 C.F.R. § 1.429.

²⁵ *Petition for Reconsideration by Acadiana Cellular General Partnership*, WT Docket No. 04-323, Order on Reconsideration, 20 FCC Rcd 8660, 8663, para. 8 (2006).

²⁶ Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, *Report and Order*, 26 FCC Rcd 1594, 1606, paras. 27-28 (2011) (*Revision of Recon Rules Order*); *see also* 47 C.F.R. §§ 1.429(l) (codifying delegation in rulemaking cases) and 1.106(p) (codifying same delegation in non-rulemaking cases).

²⁷ The examples above are drawn from the rules' illustrative list of petitions for reconsideration that would "plainly . . . not warrant consideration" and thus fall within the staff's delegated authority. *See* 47 C.F.R. §§ 1.429(l)(1), (3). In adopting the rules, the Commission emphasized that this list is not intended to be exhaustive, as "it is difficult to foresee every circumstance in which staff appropriately should be allowed to exercise this authority," and such a limitation would thus "depriv[e] staff of the necessary flexibility to handle particular petitions." *Revision of Recon Rules Order*, 26 FCC Rcd at 1607, para. 29.

²⁸ Petition at 7 (citing *Data Roaming Order*, 26 FCC Rcd at 5452, para. 84).

²⁹ *Id.*

does not present a material error, omission or reason warranting reconsideration.³⁰ As these rules and procedures regarding negotiations over data roaming arrangements were newly created in this proceeding, there is little track record upon which to calculate the likely number of complex negotiations that may occur, and Blanca has provided nothing concrete upon which to base such a projection. Moreover, the very nature of the evolving mobile broadband industry, the variable nature of the network configurations, services, technologies, and business plans involved, and the individualized nature of data roaming agreements make it unrealistic to predict the relative number of data roaming negotiations that may raise complex or fact-intensive issues at any given time. Further, this uncertainty itself counsels against establishing a uniform deadline in all cases, particularly given the ability of providers under the rule to negotiate individualized data roaming agreements.³¹ Blanca's argument therefore does not support reconsideration of the Commission's approach.³²

10. Blanca and other commenters supporting the petition also argue the Commission failed to consider the larger providers' greater bargaining power and lack of incentives to enter into roaming agreements.³³ They contend that the Commission's approach exacerbates this problem and that only a "shot clock" will adequately address incentives to delay.³⁴ We disagree. The Commission carefully considered the impact of incentives on parties' negotiating conduct. In deciding to adopt its data roaming rule, the Commission highlighted the concern that "consolidation may have . . . reduced the incentives of the largest two providers to enter into [data roaming] arrangements by reducing their need for reciprocal roaming."³⁵ Further, it adopted specific measures to address the possibility that providers might engage in unreasonable delay. In particular, the Commission imposed on providers a duty to respond promptly to requests for data roaming and avoid actions that unduly delay negotiations regarding that request, and it provided an enforceable remedy.³⁶ It further provided that if a requesting provider believes that the other party is violating its duty by unduly delaying the negotiation, the provider may bring such claim to the

³⁰ See 47 C.F.R. § 1.429(l)(1).

³¹ Indeed, even the proponents of a "shot clock" in this proceeding appear to recognize that the ongoing transition from 3G to 4G data roaming agreements raises potentially complex issues for negotiation. See *MetroPCS et al.* Comments at 6 n.14. As noted by AT&T, *MetroPCS et al.*'s comments detail several complex issues that must be addressed in the course of data roaming negotiations, including "various classes of service, traffic prioritization, network testing, and future traffic projections." AT&T Reply at 2–3 (citing *MetroPCS et al.* Comments at 7–8).

³² See, e.g., *Data Roaming Order*, 26 FCC Rcd at 5433, para. 45; see also *id.* at 5450, para. 78 (rule provides "greater flexibility and variation in terms and conditions"); *CellCo Partnership v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012) (upholding the data roaming rule in part because it "leaves substantial room for individualized bargaining").

³³ See, e.g., Petition at 8; *MetroPCS et al.* Comments at 6–7; NTCH Comments at 1–2; Blooston Reply Comments at 3–4.

³⁴ See, e.g., Blanca Reply Comments at 4; *MetroPCS et al.* Comments at 8. Some commenters point to Congressional- and Commission- imposed deadlines and "shot clock" requirements in "tower siting," pole attachment, and other contexts in advocating the adoption of a "shot clock" here. See, e.g., *MetroPCS et al.* Comments at 10–13; Blooston Reply Comments at 4 (citing *MetroPCS et al.* Comments at 10–13). We do not find these other contexts, involving very different regulatory schemes and issues, persuasive as guides to what approach the Commission should adopt for data roaming negotiations. A more analogous context is the Commission's earlier voice roaming proceeding, in which the Commission, in adopting rules governing voice roaming obligations, rejected requests for a negotiation "shot clock" and instead adopted a "case-by-case" approach to addressing claims of unreasonable behavior in roaming negotiations, including claims of undue delay. See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15829–31, paras. 30–35 (2007); see also Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181, 4199–01, paras. 37–40 (2010).

³⁵ *Data Roaming Order*, 26 FCC Rcd at 5426, para. 27.

³⁶ *Data Roaming Order*, 26 FCC Rcd at 5432, para. 42.

Commission at any time and ask the Commission to set a deadline for one or both parties to act.³⁷ The Commission also emphasized that “in the event a would-be host provider violates its duty by actions that unduly delay or stonewall the course of negotiations, [the Commission] stands ready to move expeditiously with fines, forfeitures, and other appropriate remedies, which should reduce any incentives to delay data roaming negotiations.”³⁸

11. Accordingly, Blanca’s argument based on disparate bargaining power has already been fully considered and rejected by the Commission.³⁹ It also identifies no material error, omission, or reason warranting reconsideration.⁴⁰ While Blanca and other commenters allege that roaming negotiations can take inordinate periods of time, they fail to demonstrate that the processes established in the *Data Roaming Order* rules are inadequate to address problems of unreasonable delay. They offer no reason why providers cannot avail themselves of the established remedies, including the ability to ask the Commission to set a deadline for a particular negotiation, or evidence that providers have utilized current procedures and found them ineffective.

12. In conclusion, we find nothing in the arguments or the record justifying reconsideration of the Commission’s approach, which was designed to ensure that the data roaming rule remains sufficiently flexible to apply to a wide range of evolving technologies and commercial contexts, while allowing individual providers to seek expedited intervention by the Commission when a provider is unduly delaying the course of a data roaming negotiation.⁴¹ Accordingly, the Petition is denied. We remind parties, however, that the Commission “intend[s] to closely monitor further development of the commercial mobile broadband data marketplace and stand[s] ready to take additional action if necessary to help ensure” that the goals of the data roaming proceeding are achieved.⁴²

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to the authority contained in Sections 1, 2, 4(i), 4(j), 301, 303, 304, 309, 316, 332, and 405 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154, 301, 303, 304, 309, 316, 332, 405, and 1302, and the delegated authority under Section 1.429 of the Commission’s rules, 47 C.F.R. § 1.429, that this Order on Reconsideration **IS ADOPTED**, effective on publication of the text or summary thereof in the Federal Register.

³⁷ *Id.* at 5451-52, para. 84. As noted above, the Commission has delegated authority to the appropriate Bureaus to resolve such disputes.

³⁸ *Id.* at 5451, para. 80. We emphasize that the Commission’s recognition that roaming negotiations may be complex or fact intensive should not lead host providers to rely on such recognition to engage in unreasonably delay before making an offer.

³⁹ See 47 C.F.R. § 1.429(l)(3).

⁴⁰ See *id.* § 1.429(l)(1).

⁴¹ *Data Roaming Order*, 26 FCC Rcd at 5451-52, paras. 80, 84. In its comments, NTCH asks the Commission to set a “presumptive cap” on the rates that host providers may charge for data roaming. NTCH Comments at 2. Because this proposal is outside the scope of the instant Petition, we decline to consider it.

⁴² See *Data Roaming Order*, 26 FCC Rcd at 5438, para. 56.

14. **IT IS FURTHER ORDERED**, pursuant to the authority contained in Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the Petition for Reconsideration filed by Blanca Telephone Company on June 6, 2011, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Roger C. Sherman
Chief
Wireless Telecommunications Bureau